NO. 823260

SUPREME COURT
OF THE STATE OF WASHINGTON

NOEL PROCTOR,

Petitioner,

vs.

ROBERT "FORD" HUNTINGTON and CHRISTINA HUNTINGTON, husband and wife, and the marital community therein,

Respondents.

RESPONDENTS HUNTINGTONS' SUPPLEMENTAL BRIEF

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I. INTRODUCTION

The Petitioner challenges the fundamental power of trial courts to balance the hardships before it issues an equitable remedy. Noel Proctor wants this Court to overturn the well-established rule[1] requiring trial judges to consider the equities before issuing a mandatory injunction, and replace it with a new rule that require judges to blindly and automatically issue an injunction whenever an encroachment is more than *de minimis*,[2] a term that Proctor has not defined.

Proctor does not challenge the trial court's application of the factors laid out by this Court in *Arnold v. Melani*. Nor does he claim the judge abused his discretion when he ruled that requiring the Huntingtons to remove their home would be oppressive under the circumstances. Proctor instead argues for a new rule—a rule that would completely deprive trial judges of *the authority* to deny a mandatory injunction whenever an encroachment is more than *de minimis*. There are simply no compelling reasons for this Court to adopt a *de minimis* exception to a trial judge's inherent power to balance the hardships or to fashion remedies that are most appropriate and equitable under the particular circumstances of the case. This Court should therefore uphold the trial court and the

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[1] *Arnold v. Melani*, 75 Wn.2d 143, 437 P.2d 908 (1968).
[2] "*De minimis,*" "slight," or "trifle" have been used interchangeably throughout this appeal.

Court of Appeals' decisions.

II. ISSUES PRESENTED FOR REVIEW

1. Mandatory injunctions are considered extraordinary remedies not favored in law, and courts are required to balance the hardships before they are issued.[3] The judge considered the equities and balanced the harms in this case and determined that the hardship resulting from requiring the Huntingtons to tear down their home outweighed any harm to Proctor and that Proctor could be made whole through monetary damages. Was the trial judge required by law to ignore the equities and automatically issue a mandatory injunction because the Huntingtons' encroachment was more than *de minimis*?[4]

2. Trial courts, when exercising equitable jurisdiction, have broad discretion to fashion an appropriate remedy.[5] Because the judge

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[3] *Arnold v. Melani*, 75 Wn.2d at 152 (mandatory injunctions are not to be issued as a matter of course).

[4] The term *de minimis* has never been defined. The Huntingtons concede that the encroachment was more than *de minimis*; however, they contend that the trial court's decision should be upheld nonetheless. If this Court adopts a new rule of law, then the Huntingtons suggest that the issue of what constitutes a *de minimis* encroachment must be defined, and then applied in this case.

[5] *Sorenson v. Pyeatt*, 158 Wn.2d 523, 146 P.3d 1172 (2006) ("In matters of equity, trial courts have broad discretionary power to fashion equitable remedies."). *In re Proceedings of King County*, 123 Wn.2d 197, 204, 867 P.2d 605 (1994). *Blair v. Wash. State Univ.*, 108 Wn.2d 558, 564, 740 P.2d 1379 (1987) ("The Supreme Court reviews the authority of a trial court to fashion equitable remedies under an abuse of discretion standard."). "However, it is a well-established rule that an equitable remedy is an extraordinary, not ordinary form of relief." HENRY L. MCCLINTOCK, HANDBOOK OF THE PRINCIPLES OF EQUITY § 2, at 47 (2d Ed.1948). A court will grant equitable relief only when there is a showing that a party is entitled to a remedy and the remedy at law is inadequate. *Orwick v. Seattle*, 103 Wn.2d 249, 252, 692 P.2d 793 (1984).

determined that forcing the Huntingtons to tear down their home was not equitable under the circumstances of this case, he ruled that the Huntingtons could purchase, through a boundary line adjustment, the property occupied by their home. Does a trial court have discretion to refuse to issue a mandatory injunction if an encroachment is more than *de minimis*, if issuance of the injunction would create an unfair and oppressive result?

3. The "betterment statute"[6] permits a defendant sued in ejectment to seek, by way of a counterclaim, reimbursements for any improvements made by the encroacher. In this case, the Huntingtons did not plead the betterment statute but instead asked the court to deny the requested mandatory injunction on equitable principles. Does failure to plead the "betterment statute" preclude a court from exercising equitable discretion?

III. ARGUMENT

A. The Trial Court Properly Exercised Its Equitable Powers When It Refused To Issue A Mandatory Injunction That Would Have Resulted In An Oppressive Remedy.

Proctor asks this Court to adopt a new rule of law that would require trial courts to automatically, and blindly, issue a mandatory injunction whenever an encroachment is deemed more than "minor." In

reality, Proctor wants this Court to overturn *Arnold v. Melani*, and other similar cases, and create an exception to the well-established principle that courts must consider the equities (or "balance the harms") in each particular case before it decides whether to issue a mandatory injunction. Because stripping away the court's inherent power to balance the equities could result in harsh and unjust results, this Court should decline Proctor's invitation and instead reaffirm the trial courts' well-established power to issue remedies that are fair and just.

1. Courts Have Broad Discretion On Whether To Grant A Mandatory Injunction And Will Not Do So If It Will Create An Unjust Result.

"'Equity' is the principle, or set of principles, under which substantial justice may be attained in particular cases where the prescribed or customary forms of ordinary law seem to be inadequate."[7] "[E]quity's purpose is to promote and achieve *justice* and to do so with some degree of *flexibility*."[8] "Equity will not sanction an unconscionable result merely because it may have been brought about by means which simulate legality."[9]

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[6] RCW 7.28.160 and .170.
[7] 27A AM. JUR. 2D EQUITY § 1 (2008).
[8] 27A AM. JUR. 2D EQUITY § 2 (2008).
[9] 27A AM. JUR. 2D EQUITY § 84 (2008).

A trial court, sitting in equity, may fashion a broad range of remedies to do substantial justice to the parties.[10] Indeed, trial courts are instructed to balance the hardships whenever they are asked to consider the issuance of an injunction, especially a mandatory injunction.[11] The novelty of a problem will not prevent a court from acting, and the court may suit the remedies to fit the particular circumstances of the case so as to enforce the substantial rights of all parties before them.[12]

Equity also includes the power of courts to prevent the enforcement of a legal right when to do so would be inequitable under the circumstances.[13] Therefore, stripping a trial court of its equitable discretion would mark a significant, unprecedented, and unwanted change in the law.

2. Mandatory Injunctions Are Extraordinary Remedies And Should Not Be Issued If They Could Create A Harsh Result.

Proctor sued for extraordinary relief in this case: He wanted the trial court to order the Huntingtons to tear down their home even though it was placed on Proctor's side of the boundary line in a good faith, but mistaken, belief of the property lines and regardless of the cost and

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[10] *Paris v. Allbaugh*, 41 Wn. App. 717, 719, 704 P.2d 660 (1985).
[11] *Tyler Pipe Indus. v. State*, 96 Wn.2d 785, 638 P.2d 1213 (1982).
[12] *Grismer v. Merger Mines Corp.*, 43 F. Supp. 990 (1942), *modified* 137 F.2d 335 (1943), *cert. den.*, 320 U.S. 794, 64 S. Ct. 261, 88 L. Ed. 478 (1943).
[13] *Mendez v. Palm Harbor Homes, Inc.*, 111 Wn. App. 446, 460, 45 P.3d 594 (2002).

hardship to the Huntingtons, or the comparable harm to Proctor.[14] Proctor argues that, because of the extent of the encroachment, the trial court lacked all discretion to consider the equities. He wanted the trial judge to blindly grant his request for a mandatory injunction without regard to the consequences or harm to the Huntingtons or the benefit of the removal to himself.[15]

The granting or withholding of an injunction has always been addressed to the sound discretion of the trial court, which is to be exercised in accordance with the circumstances of each case.[16] An injunction is an extraordinary remedy that should only be granted if there is no adequate remedy at law.[17] "Mandatory injunctions are...disfavored as a harsh remedy and are used only with caution and in compelling circumstances."[18]

The rule has always required, or at least allowed, trial courts to consider the equities before issuing a mandatory injunction. Proctor, without citing to any legal authority or providing the court any good

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[14] Even Proctor believed that the home had been properly constructed on the Huntingtons' side of the property line.

[15] It is worth noting that Proctor's request for relief at trial was less than clear. At trial, Proctor testified, "I think at this point it would be appropriate for them to live on their own property." RP 810. Proctor was then asked, "[w]hat do you want done with the house, sir?" Proctor responded, "[d]on't know." *Id.*

[16] *Alderwood Assocs. v. Wash. Envtl. Council*, 96 Wn.2d 230, 233, 635 P.2d 108 (1981).

[17] *See Kucera v. DOT*, 140 Wn.2d 200, 209, 995 P.2d 63 (2000) ("[I]njunctive relief will not be granted where there is a plain, complete, speedy and adequate remedy at law.").

reasons, wants to carve out a special exception to this rule for cases where an encroachment is more than *de minimis.*

a. *Arnold* provides appropriate factors for a court to consider before issuing a mandatory injunction in encroachment cases.

Proctor argues that, under *Arnold*, trial judges can only deny a mandatory injunction when the encroachment is "minor."[19] Proctor misconstrues *Arnold* and, as a result, seeks relief that has been rejected by this Court in *Arnold* and its progeny.

After determining that the encroachment was more than a trifle and warranted further review, the trial court in *Arnold* balanced the equities and hardships and denied a mandatory injunction. The Court upheld the trial court and established a list of factors to help guide a court when considering whether an injunction should be issued. The *Arnold* decision is directly on point with other Washington cases, including *People's Savings Bank v. Bufford.*[20]

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[18] 42 AM. JUR. 2D INJUNCTIONS § 5 (2008) ("courts are perhaps more reluctant to interpose mandatory injunctions than prohibitory injunctions").

[19] Glaringly missing from Proctor's analysis is a definition of what is considered a "minor" encroachment. Would a court have discretion to determine what constitutes a "minor" encroachment? For example, in this case, the court found that approximately one acre of Proctor's property would be necessary for the Huntingtons to enjoy their home. Proctor owns 36.17 acres. RP 467. One acre represents less than a three percent (3%) encroachment. Would that be considered a minor encroachment? If accepted, Proctor's position would lead to greater confusion.

[20] 90 Wash. 204, 155 P. 1068 (1916).

In *Bufford*, the "encroacher"[21] built his house entirely upon the Plaintiff's lot, believing it was his own lot. The court refused to issue an injunction and instead fashioned a more appropriate and equitable remedy. This Court upheld that ruling. *Bufford* remains the law today. A court will not force a person to lose their home under circumstances where the encroacher acted in good faith and the issuance of the injunction would be harsh. Indeed, because it involved the loss of an entire lot, the encroachment in *Bufford* is certainly much more substantial than the encroachment in this case.

Proctor attempts to distinguish *Bufford* by arguing that this case is not about "a total encroachment."[22] This "distinction" does not make sense nor has it ever been referred to in the many cases that have cited or relied upon *Bufford*. Instead, courts are quick to note that "no two cases are alike in their facts, and with respect to the facts each case must stand upon its own bottom."[23] That is the point of equity—it is designed to provide fairness to the parties under the circumstances and not to be applied blindly. Proctor simply does not like the result. Since he cannot

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[21] While "encroachment" seems to be a term of legal art, WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY (1991) defines the term to mean to "advance beyond the usual or appropriate limits."

[22] Br. of Petitioner, p. 13.

[23] *Id., citing Kent v. Holderman*, 140 Wash. 353, 354, 248 P. 882 (1926). In *Kent*, the Court did not follow the holding of *Bufford* for the reasons put forth by Proctor. Instead, the Court found that one party had not proven adverse possession to the requisite element.

argue that the court abused its discretion, he can only hope that this Court will strip trial courts of the power to exercise equitable discretion.

Proctor can only prevail if this Court is willing to overturn *People's Savings Bank v. Bufford*, *Arnold*, and the cases that have followed and relied upon the holding from these cases. Because these cases correctly state the longstanding law, and retains a court's inherent equitable powers, this Court should decline to overturn them and instead uphold the well-established rule affirmed by the two lower courts.

b. A trial court's discretion is not limited to cases that only involve a minor encroachment.

Proctor does not challenge the court's application of the *Arnold* factors to the present case.[24] He instead argues that trial judges must blindly issue a mandatory injunction whenever the encroachment is more than minor—a term that Proctor does not and cannot define.

In *Arnold*, the defendants relied upon a *de minimis* theory as a means for the Court to deny the mandatory injunction. This Court rejected this defense and stated that "it is certain that the instant case does involve a positive invasion of the land of another, and is something more than a

[24] "Where a decision or order of the court is a matter of discretion, it will not be disturbed on review except on a clear showing of abuse of discretion, that is discretion manifestly unreasonable, or exercised on untenable ground, or for untenable reasons." *Miller v. Campbell*, 164 Wn.2d 529, 536, 192 P.3d 352 (2008). In this case, Proctor does not assign error to the trial court's remedy. Instead, Proctor appears to argue the trial court lacked the authority to issue its remedy.

trifle."[25]

In this appeal, Proctor takes and distorts this one quote from *Arnold*, to argue that courts must grant an injunction when the encroachment is more than *de minimis*. This Court actually held in *Arnold* that a trial judge need not even get to the point of balancing the equities if an encroachment is slight (*de minimis*) because "the law does not concern itself with trifles."[26]

It is clear that this Court in *Arnold* was laying out a simple framework to guide courts on how to analyze encroachment cases. If an encroachment is a "trifle," then a court may deny a mandatory injunction without balancing the hardships because the plaintiff has not suffered enough harm to warrant any remedy. On the other hand, if a case—such as in *Arnold* or the case at hand—involves an encroachment that is more than a "trifle," then a court must balance the hardships to determine whether an injunction should issue. This approach has been followed by

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[25] *Arnold*, 75 Wn.2d at 148.
[26] *Hanley v. Most*, 9 Wn.2d 429, 471, 115 P.2d 933 (1941).

Washington and many other courts,[27] and should not be overturned.

Proctor tries to bootstrap the *de minimis* exception to argue that courts *must* issue a mandatory injunction if the encroachment is more than *de minimis*. This would distort the Court's holding in *Arnold* and turn the rule on its head. This rule of law would also strip trial courts of their inherent authority to issue equitable relief.

While Proctor misconstrues *Arnold* to argue that a court's only function is to determine whether the encroachment is something less than a trifle, he fails to define what should be considered a "trifle," or even explain what a court should do if the encroachment is only slight. He also fails to explain why encroachment cases should be *the only time* a court exercising its equitable powers should be deprived the right to balance the harms or consider the effect an injunction may have on an innocent party. This Court should reject Proctor's attempt to change the law, uphold *Arnold* and *Bufford,* and affirm the trial court's and Court of Appeals'

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[27] Indeed, the cases from other jurisdictions cited by Proctor as supporting his position actually reject his arguments and follow the rule set forth in *Arnold* (mandatory injunction may be denied without first balancing the hardships if it's minor). *See Alabama Power Co. v. Drummond*, 559 So.2d 158 (Ala. 1990); *Stuttgart Elec. Co., Inc. v. Riceland Seed Co.*, 33 Ark. App. 108, 802 S.W.2d 484, 487 (Ark. App. 1991) ("A mandatory injunction to compel the removal of buildings or other structures wrongfully placed on the land of another will not be granted when it will operate inequitably or oppressively, **or where the encroachment is trifling** and the result of an innocent mistake and the damage caused to defendant by removal would be greatly disproportionate to the interest which plaintiff claims."), *citing* 43A C.J.S. INJUNCTIONS § 81 (1978). *See also Golden Press, Inc. v. Rylands*, 124 Colo. 122, 235 P.2d 592 (Colo. 1951) (Sometimes a slight and harmless encroachment is held to be within the rule

decisions.

B. Parties Are Not Required To Plead The Betterment Statute In Order To Seek Equitable Relief.

Proctor's second argument is that a defendant's decision not to raise the "betterment statute"[28] should absolutely bar a trial judge from exercising its discretion in encroachment cases. Proctor essentially claims the statute trumps a trial court's inherent authority to deny a mandatory injunction. This would constitute new law. And despite the fact that the statute has existed for over 106 years, Proctor fails to cite to any authority for such a limitation on a judge's inherent power.

The betterment statute was enacted in 1903, well before many of the pivotal cases on mandatory injunction.[29] This statute was not intended to replace a trial court's inherent authority to exercise equitable discretion in cases involving mandatory injunctions. Nor is there any requirement that a party plead the betterment statute as a condition to challenge a plaintiff's request for an injunction.

Although all of the cases cited by Proctor and the Huntingtons were decided after the betterment statute was enacted, *none* of these held that the betterment statute precluded the court from exercising its equitable

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"de minimis.").
[28] RCW 7.28.160 and .170.
[29] RCW 7.28.160 and .170.

powers.[30] The Huntingtons chose in this case to seek, by way of defenses and counterclaims, equitable rather than monetary relief in response to Proctor's request for equitable relief. They wanted their home; not to be reimbursed for their out-of-pocket cost to build the home. In short, the betterment statute should not be construed to trump a trial court's discretion to deny a mandatory injunction. This would indeed be a remarkable and unprecedented rule of law.

IV. CONCLUSION

Courts have always had the inherent power to consider the hardships and equities whenever it is being asked to issue a mandatory injunction. Courts also have broad discretion in cases of equity to determine the appropriate remedy under the circumstances. It is also undisputed that the trial court properly applied *Bufford*, *Arnold*, and their progeny in this case. Thus, the only question is whether this Court will adopt a new and unprecedented rule of law creating a special exception for cases involving encroachments.

Adopting a new rule of law that would deprive courts the inherent power to fashion equitable relief would create a risk of "unconscionable results." This Court should instead uphold the fundamental principle that

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[30] *See Arnold, Bufford, Hanson v. Estell*, 100 Wn. App. 281, 997 P.2d 426 (2000), *Wells v. Parks*, 148 Wash. 328, 268 P. 889 (1928), and *Adamec v. McCray*, 63 Wn.2d 217, 386 P.2d 427 (1963).

gives trial courts broad discretion to fashion the most appropriate remedy under the particular circumstances of each case. The Court of Appeals' and trial court's decisions should therefore be affirmed.

Dated: June 30, 2009.

SCHWABE, WILLIAMSON & WYATT, P.C.

By: _____

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CERTIFICATE OF FILING

I hereby certify that on the 30th day of June, 2009 I caused to be filed the original and one copy of the foregoing RESPONDENTS HUNTINGTONS' SUPPLEMENTAL BRIEF with the Supreme Court Administrator at this address:

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I hereby certify that on the 30th day of June, 2009, I served one correct copy of the foregoing RESPONDENTS HUNTINGTONS' SUPPLEMENTAL BRIEF by First Class Mail to:

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